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Pereida v. Wilkinson: Subjecting Immigrants to an Uphill Climb in Obtaining Relief from Deportation

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PEREIDA V. WILKINSON: SUBJECTING IMMIGRANTS TO AN UPHILL CLIMB IN OBTAINING RELIEF FROM DEPORTATION

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In *Pereida v. Wilkinson*,[1] the Supreme Court evaluated whether a noncitizen[2] carries the burden to prove that they were not convicted of a disqualifying crime, such as a crime involving moral turpitude, under the Immigration and Nationality Act ("INA")[3] to be eligible for cancellation of removal.[4] The Court held that in proceedings where a noncitizen seeks relief from removal, the immigrant carries the burden to produce evidence demonstrating that their crime did not involve moral turpitude.[5] The Court interpreted the INA to indicate that Congress intended to shift the burden of

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1. 141 S. Ct. 754 (2021).

2. Consistent with recent efforts by the Biden Administration to describe immigrants in more humanizing language, the author will refrain from use of the word "alien." *See* Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans, 86 Fed. Reg. 8277, 8277–78 (Feb. 5, 2021). This term is currently used in the Immigration and Nationality Act ("INA"); however, President Biden has undertaken efforts to amend immigration statutes to substitute the word "alien" with the term "noncitizen." Nicole Acevedo, *Biden Seeks to Replace 'Alien' with Less 'Dehumanizing Term' in Immigration Laws*, NBC NEWS (Jan. 22, 2021, 3:34 PM), https://www.nbcnews.com/news/latino/biden-seeks-replace-alien-less-dehumanizing-term-immigration-laws-n1255350. The U.S. Department of Homeland Security has encouraged its attorneys to instead use the term "noncitizen" to refer to individuals described in section 101(a)(3) of the INA. *See* Memorandum from Troy A. Miller, Senior Official Performing the Duties of the Commissioner on Updated Terminology for CBP Communications and Materials to Staff (Apr. 19, 2021). To the extent practicable, this Note uses the word "noncitizen" in place of "alien."

3. Immigration and Nationality Act, Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952), *amended by* Act of Oct. 3, 1965, Pub. L. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).

4. *Id.* §§ 1229a(c)(4), 1229b(b)(1).

5. *Pereida*, 141 S. Ct. at 767.

proof to the immigrant in cancellation of removal proceedings.[6] With this ruling, the Court limited the application of the categorical approach framework intended by Congress.[7] Further, the Court's holding is improper as it misinterprets earlier Supreme Court precedent regarding the categorical approach.[8] Finally, the Court's judgment will hamper the administrative and judicial efficiency of our nation's already overburdened immigration system and presents troubling Sixth Amendment implications for noncitizens seeking relief.[9]

I. THE CASE

Clemente Pereida came to the United States from Mexico in 1995.[10] While living in this country for twenty-five years, Mr. Pereida was employed in construction and cleaning and raised three children with his wife.[11] Recognizing that Mr. Pereida entered the United States without authorization and inspection, in 2009, the Department of Homeland Security ("DHS") issued Mr. Pereida a Notice to Appear for removal proceedings.[12]

Mr. Pereida conceded that he was deportable but requested a cancellation of removal order from the U.S. Attorney General, asserting that he met the qualifications[13] and was eligible.[14] While his removal proceedings continued, Mr. Pereida was convicted under a Nebraska criminal statute[15] for attempting to commit criminal impersonation,[16] to which he pled *nolo contendere*.[17]

6. *Id.* at 761.

7. *See infra* Section IV.A.

8. *See infra* Section IV.B.

9. *See infra* Section IV.C.

10. Pereida v. Barr, 916 F.3d 1128, 1130 (8th Cir. 2019).

11. *Pereida*, 141 S. Ct. at 767–68 (Breyer, J., dissenting).

12. *Id.* at 768.

13. To obtain a cancellation of removal order through the Attorney General, a noncitizen must satisfy the following eligibility requirements: (1) that they have been physically present in the United States for at least ten years continuously; (2) that they have been a person of "good moral character"; (3) that they have not been convicted of a disqualifying offense such as a crime involving moral turpitude; and (4) that their removal would cause extreme and unusual hardship to their immediate, U.S. citizen or permanent resident family members. 8 U.S.C. § 1229b(b)(1).

14. *Pereida*, 141 S. Ct. at 759 (majority opinion).

15. NEB. REV. STAT. § 28-608 (2008) (since amended and moved to NEB. REV. STAT. § 28-638 (2015)).

16. *Pereida*, 141 S. Ct. at 760 ("[A] copy of the criminal complaint against Mr. Pereida show[ed] that Nebraska had charged him with using a fraudulent social security card to obtain employment.").

17. *Id.* at 768 (Breyer, J., dissenting). Nebraska courts have consistently found that a plea of *nolo contendere* is not an admission of guilt but is merely indicative of the defendant's decision not to contest the charge against them. State v. Jenkins, 931 N.W.2d 851, 868 (Neb. 2019). The factual

Mr. Pereida's state conviction created immigration consequences in his application for cancellation of removal. Based on Mr. Pereida's conviction, the immigration judge ("IJ") found that Mr. Pereida would be ineligible for relief if his conviction was for a crime involving moral turpitude.[18] Precedent indicated that crimes that involved specific intent to commit fraud or deceit necessarily involved moral turpitude.[19] The IJ managing Mr. Pereida's case found that the Nebraska statute was "divisible," meaning there were specific provisions a defendant could be convicted of that necessarily involved fraud, and others that did not.[20] The IJ held that Mr. Pereida's conviction fell under a provision that necessarily required fraud, thus finding that Mr. Pereida had committed a crime involving moral turpitude.[21]

On review, the Board of Immigration Appeals ("BIA") agreed with the IJ that Mr. Pereida was not qualified for cancellation of removal, but the BIA differed in its reasoning. The BIA agreed with the IJ that the statute was divisible.[22] However, reviewing the record from the state court, the BIA was unable to determine which subsection of the Nebraska statute Mr. Pereida was convicted of violating.[23] Considering this inconclusive inquiry, the BIA found that Mr. Pereida bore the burden to prove that he was not convicted of a crime involving moral turpitude, and that the petitioner failed to satisfy this burden.[24] The BIA adopted the findings of the IJ and denied Mr. Pereida's application for relief.[25]

The Eighth Circuit affirmed the BIA's decision, expanding upon the lower court's reasoning. The Eighth Circuit found that courts evaluating a noncitizen's conviction should apply the "categorical approach," where the state conviction and statute are compared with the generic definition of a

basis for the charge may not be construed as an admission of guilt. *In re* Verle O., 691 N.W.2d 177, 182 (Neb. Ct. App. 2005).

18. *Pereida*, 141 S. Ct. at 759, 760 (majority opinion). See Immigr. L.—Offenses Involving Moral Turpitude, 37 Op. Att'ys Gen. 293, 294 (1933), for a description of crimes involving moral turpitude, such as those involving "an act of baseness, vileness, or depravity."

19. *Pereida*, 141 S. Ct. at 759–60; *see also* Ceron v. Holder, 747 F.3d 773, 779–80 (9th Cir. 2014).

20. *See Pereida*, 141 S. Ct. at 760; Pereida v. Barr, 916 F.3d 1128, 1130–31 (8th Cir. 2019) (finding that of the four provisions of the Nebraska criminal impersonation statute, only subsection (c), related to the carrying on of an unlicensed business, does not necessarily involve fraud).

21. *Pereida*, 916 F.3d at 1130–31.

22. *Id.* at 1131 (finding that only subsections (a), (b), and (d) of the Nebraska statute were crimes involving moral turpitude, as they "each contained as a necessary element the intent to defraud or deceive, thus making the statute divisible").

23. *Id.*

24. *Id.*

25. *Id.*

crime to determine if the noncitizen's conviction involved moral turpitude.[26] The court agreed that it could not determine which provision of the Nebraska statute Mr. Pereida's conviction fell under, and thus whether the conviction involved moral turpitude.[27] Despite this, the Eighth Circuit read the INA to impose a burden on the noncitizen seeking relief from deportation to show that they are eligible for cancellation of removal, which includes proving they have not been convicted of a crime involving moral turpitude.[28] Considering that a circuit split had developed on this very question,[29] the Supreme Court granted certiorari to review the Eighth Circuit's holding.[30]

II. LEGAL BACKGROUND

The Supreme Court has long recognized the power of the federal government to remove immigrants for violating state or federal law.[31] Although federal power in this arena is broad, removal is limited by principles of due process to ensure that noncitizens have an opportunity to challenge their deportation and to promote consistency across cases.[32] Seeking to promote these ends, Congress and the judiciary developed a "categorical approach" to assess immigrants' criminal convictions without having to engage in broad factfinding.[33] Section II.A discusses the origins of immigration law and the application of the INA.[34] Section II.B describes the origins of the categorical approach and its historical pedigree.[35] Section II.C evaluates the development and modern application of the categorical approach.[36] Finally, Section II.D assesses the application of the categorical

26. *Id.* (citing Moncrieffe v. Holder, 569 U.S. 184, 190 (2013)).

27. *Id.* at 1132.

28. *Id.* (citing 8 U.S.C. § 1229a(c)(4)(A)(i)).

29. *See infra* notes 152–161 and accompanying text.

30. Pereida v. Wilkinson, 141 S. Ct. 754, 760 (2021).

31. Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893).

32. *See id.* at 738, 741 (Brewer, J., dissenting); United States *ex rel.* Mylius v. Uhl, 210 F. 860, 863 (2d Cir. 1914) ("[T]he law must be uniformly administered. It would be manifestly unjust so to construe the [same criminal] statute as to exclude one person and admit another . . . ."), *aff'g*, 203 F. 152 (S.D.N.Y. 1913).

33. *Pereida*, 141 S. Ct. at 768 (Breyer, J., dissenting). The development of the categorical approach originated in the judiciary as a means of increasing administrative efficiency and ensuring a consistent disposition of immigration cases. *Mylius*, 210 F. at 863. Congress has implicitly condoned this technique's application by declining to amend certain provisions of the INA. *See infra* Section II.B.2.

34. *See infra* Section II.A.

35. *See infra* Section II.B.

36. *See infra* Section II.C.

approach in immigration law by different circuits when ambiguity remains regarding a noncitizen's criminal conviction.[37]

A. Origins of Immigration Law and Development of the INA

Immigration law in the United States has undergone tectonic shifts since the Founding Era but continues to be administered by executive agencies acting under Congress's direction.[38] Section II.A.1 explores the lasting debate surrounding the basis of federal power in the immigration context.[39] Section II.A.2 discusses the development of the INA and administrative remedies at an immigrant's disposal to stay their deportation.[40] Finally, Section II.A.3 provides an overview of the immigration law system, and the legal requirements for a noncitizen to qualify for cancellation of removal.[41]

1. The Origins of Federal Power in the Immigration Context

The extent of federal power over immigration has long been a matter of debate.[42] The Constitution lacks an express grant of power to any branch of the federal government to regulate immigration and the deportation of noncitizens.[43] Instead, federal authority is implied from various clauses granting Congress and the President power to pass rules of naturalization and to "punish . . . [o]ffences against the Law of Nations."[44] This position received early scrutiny during the debate surrounding the Alien Friends Act of 1798,[45] in which James Madison noted[46] that Congress was "exercis[ing] a power no where delegated to the Federal Government" in exercising control

37. *See infra* Section II.D.

38. *See* 8 U.S.C. § 1103 (tasking the Departments of Homeland Security, State, and Justice with the "administration and enforcement" of immigration statutes).

39. *See infra* Section II.A.1.

40. *See infra* Section II.A.2.

41. *See infra* Section II.A.3.

42. See Ilya Somin, *Does the Constitution Give the Federal Government Power Over Immigration?*, CATO UNBOUND (Sept. 12, 2018), https://www.cato-unbound.org/2018/09/12/ilya-somin/does-constitution-give-federal-government-power-over-immigration, for a discussion of the origins of federal power over immigration, tracing challenges to congressional power in this arena back to the Founding Era.

43. U.S. CONST. art. I, § 8, cl. 10; *see also supra* note 42.

44. *See supra* note 42.

45. Alien Friends Act, ch. 58, 1 Stat. 570, 571 (1798).

46. The Virginia Resolution was drafted in secret by future President James Madison. Douglas C. Dow, *Virginia and Kentucky Resolutions of 1798*, *in* THE FIRST AMENDMENT ENCYC. (2009), https://www.mtsu.edu/first-amendment/article/877/virginia-and-kentucky-resolutions-of-1798 (last visited Dec. 16, 2021). The Resolution was signed by John Stewart of the Virginia General Assembly in 1798. H.D. Res., 1798 Leg., 41 Gen. Assemb. (Va. 1798), available at https://www.loc.gov/item/ca10005182/.

over immigration.[47] Anti-federalists, such as Madison and Thomas Jefferson, believed that states have a reserved power to regulate immigration.[48]

Congressional power to deny foreigners entry into the United States was later interpreted by the Supreme Court as "necessarily exclusive and absolute."[49] The Court regarded Congress's ability to control the entry of noncitizens as an integral part of national sovereignty.[50] Because Congress has this broad power to regulate noncitizens, the Court found that it was not within its purview to assess the motives of Congress in passing restrictive immigration laws.[51]

Congress's broad power to restrict immigration was later extended to include the power to deport.[52] The Court stated that Congress's power to regulate commerce with foreign nations included the power to restrict foreigners from entering the country.[53] Further, the Court found that other enumerated powers of Congress aggregated together, including the power to control naturalization and declare war, gave the legislature the ability to "banish"—or deport—immigrants.[54] The dissenting Justices warned that the Court was allowing Congress too much unmitigated power to generally exclude and deport noncitizens.[55] Further, the Justices indicated that

47. H.D. Res., 1798 Leg., 41 Gen. Assemb. (Va. 1798), available at https://www.loc.gov/item/ca10005182/.

48. *Jefferson's Draft*, PRINCETON UNIV., https://jeffersonpapers.princeton.edu/selected-documents/jefferson%E2%80%99s-draft (last visited Feb. 11, 2022) (stating in a draft of the Kentucky Resolution that states have jurisdiction over noncitizens as the Constitution does not delegate that power to the federal government). The final version of the Kentucky Resolution did not assert that the states rather than the federal government should have jurisdiction over immigrants, though it did condemn the Alien Friends Act as unconstitutional. H.R. Res., 1798 Leg., Gen. Assemb. (Ky. 1798), available at https://www.loc.gov/item/ca10005182/.

49. Chae Chan Ping v. United States, 130 U.S. 581, 604 (1889) (quoting Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812)). For an extensive discussion of the Supreme Court's development of federal power over deportation and early counterarguments to it, see Torrie Hester, *"Protection, Not Punishment": Legislative and Judicial Formation of U.S. Deportation Policy, 1882–1904*, 30 J. AM. ETHNIC HIST., Fall 2010, at 15–25.

50. *Chae Chan Ping*, 130 U.S. at 603; *see also* Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893) (acknowledging Congress's power to expel and deport noncitizens).

51. *Chae Chan Ping*, 130 U.S. at 609 (acknowledging Congress's power to exclude noncitizens from reentry into the United States).

52. *Fong Yue Ting*, 149 U.S. at 713.

53. *Id.* at 711.

54. *Id.* at 712, 732.

55. *Id.* at 737 (Brewer, J., dissenting) (warning that the power granted by the Court to summarily banish members of a particular racial group was despotic and beyond the intent of the Framers).

banishment should be considered a criminal punishment,[56] and that the Court should be wary of violating the due process rights of noncitizens during these proceedings.[57] With these concerns in the background, Congress soon developed avenues for noncitizens to seek relief from deportation or denial of admission.[58]

2. The Development of Cancellation of Removal Through Congressional Enactments

Under the Alien Registration Act of 1940,[59] Congress established the procedure of "[s]uspension of deportation" to allow noncitizens to file a motion to stay their pending deportation.[60] The Act granted the U.S. Attorney General discretionary authority to cancel the deportation of an immigrant so long as they were eligible, and if their deportation "would result in serious economic detriment" to their American citizen or permanent resident family members.[61]

In 1952, Congress passed the INA, adding further requirements for noncitizens to qualify for suspension of deportation, and increasing the familial hardship an immigrant must show.[62] For example, under the 1952 Act, a noncitizen could only qualify for suspension of deportation if: (1) they were physically present in the country for at least seven years; (2) they were a person of good moral character; and (3) their deportation would cause "exceptional and extremely unusual hardship" to the noncitizen's American citizen or permanent resident family members.[63]

Congress replaced the remedy of suspension of deportation with the current procedure—cancellation of removal—through the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996

56. *Id.* at 740 ("Every one knows that to be forcibly taken away from home, and family, and friends, and business, and property, and sent across the ocean to a distant land, is punishment, and that oftentimes most severe and cruel.").

57. *Id.* at 754 (Field, J., dissenting) (stating that the establishment of the power of deportation represented the growth of a separate tier of law that treated immigrants differently from citizens, and which could lead to the inequitable treatment of noncitizens); *see also* Japanese Immigrant Case, 189 U.S. 86, 101 (1903) (reaffirming that due process rights apply to immigrants in deportation proceedings).

58. *See, e.g.*, United States *ex rel.* Mylius v. Uhl, 203 F. 152, 153 (S.D.N.Y. 1913) (reviewing the denial of an immigrant's application for admission), *aff'd*, 210 F. 860 (2d Cir. 1914).

59. Alien Registration Act, ch. 439, 54 Stat. 670, 670–76 (1940).

60. *Id.*

61. *Id.* at 672 (emphasis added).

62. Immigration and Nationality Act, ch. 477, 66 Stat. 163, 214 § 244 (1952), *amended by* Act of Oct. 3, 1965, Pub. L. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).

63. *Id.*

("IIRIRA").[64] The statute updated the INA, requiring that noncitizens seeking cancellation of removal must have been physically present in the United States for at least ten years, and that they had not been convicted of a disqualifying offense, such as a crime involving moral turpitude.[65] The IIRIRA also added further categories of criminal offenses which would disqualify a noncitizen from cancellation of removal.[66]

3. Removal Proceedings in the Modern Context

Today, the INA continues to govern how persons are admitted into or deported from the United States.[67] Under this statute, a noncitizen may be removed if they enter the country unlawfully or commit a serious crime while in the United States.[68] Removal proceedings are initiated when a noncitizen is served with a "Notice to Appear"[69] by a DHS officer.[70] These hearings are held in immigration court, which falls under the authority of the Executive Office for Immigration Review ("EOIR"), an agency within the U.S. Department of Justice ("DOJ").[71] An IJ is an attorney appointed and supervised by the U.S. Attorney General to serve as an administrative judge within the EOIR,[72] and presides over cancellation of removal proceedings.[73] A noncitizen is permitted representation during removal proceedings, however—unlike in criminal proceedings—an attorney is not provided for them.[74] Due to a substantial backlog of cases,[75] removal hearings are often scheduled four to five years in advance.[76]

64. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8 U.S.C.).

65. *Id.* at 3009-594.

66. *Id.*

67. Pereida v. Wilkinson, 141 S. Ct. 754, 758 (2021).

68. *Id.* at 758–59; *see also* 8 U.S.C. § 1227(a)(2) (listing serious crimes that may lead to deportation, including crimes of moral turpitude, aggravated felonies, those involving controlled substances, certain firearm offenses, etc.).

69. *E.g.*, *Sample Notice to Appear*, NAT'L IMMIGR. JUST. CTR. (June 19, 2019) https://immigrantjustice.org/for-attorneys/legal-resources/file/sample-notice-appear.

70. 8 U.S.C. § 1229(a); *see also* 8 C.F.R. § 239.1(a) (enumerating which officers may issue a Notice to Appear to a noncitizen).

71. REBECCA SCHOLTZ ET AL., REPRESENTING CLIENTS IN IMMIGRATION COURT 1 (5th ed. 2018).

72. *Id.* at 2.

73. *See* 8 U.S.C. § 1101(b)(4).

74. *Id.* § 1362 (permitting counsel for immigration proceedings, so long as the counsel is not government-funded).

75. *See infra* notes 294–297 and accompanying text.

76. Denise Gilman, *The US Deportation System Is Verging on Lawlessness*, GUARDIAN (Aug. 23, 2017, 6:00 AM), https://www.theguardian.com/commentisfree/2017/aug/23/immigration-crisis-us-deportation-system-lawlessness-trump-administration.

If an IJ finds that a noncitizen is removable, the noncitizen may apply for a cancellation of removal order. To be eligible for cancellation of removal, the noncitizen must satisfy the eligibility requirements enumerated in 8 U.S.C. § 1229b(b)(1)[77] and must file a Form EOIR-42B,[78] in which they must disclose any prior convictions.[79] A cancellation of removal order is granted at the discretion of the Attorney General, however, under the INA no more than 4,000 requests per fiscal year may be granted.[80]

B. Early Development of the Categorical Approach

The categorical approach has been applied in immigration proceedings for over a century to satisfy policy objectives of the immigration justice system.[81] Section II.B.1 outlines the judicial origins of the categorical approach, and the support the technique previously received from the U.S. Attorney General.[82] Section II.B.2 describes Congress's implicit approval of the categorical approach through their failure to alter certain statutory language.[83]

1. The Categorical Approach is Supported by a Substantial Judicial Pedigree

When assessing whether an individual may be deported or whether they meet the qualifications for relief, early federal district and circuit courts decided to develop a consistent, simple rule for reviewing a noncitizen's criminal convictions.[84] Courts acknowledged that long-past convictions often lack comprehensive records and that immigrants charged with the same crime should reliably either be admitted or denied relief.[85] Further, courts sought to limit IJs' power to conduct an inquiry into the basis of an immigrant's criminal conviction.[86]

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77. *See supra* note 13.

78. EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., OMB#1125-0001, APPLICATION FOR CANCELLATION OF REMOVAL AND ADJUSTMENT OF STATUS FOR CERTAIN NONPERMANENT RESIDENTS (2016) https://www.justice.gov/sites/default/files/pages/attachments/2016/10/20/eoir42b.pdf.

79. Pereida v. Wilkinson, 141 S. Ct. 754, 764 n.5 (2021).

80. 8 U.S.C. § 1229b(e)(2).

81. *See infra* notes 84–106 and accompanying text.

82. *See infra* Section II.B.1.

83. *See infra* Section II.B.2.

84. United States *ex rel.* Mylius v. Uhl, 203 F. 152, 153 (S.D.N.Y. 1913), *aff'd*, 210 F. 860 (2d Cir. 1914).

85. *Id.*

86. Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1690–91 (2011).

To achieve these objectives, immigration courts adopted what has become known as the "categorical approach."[87] Under this framework, to determine if a noncitizen is ineligible for relief due to a prior conviction, courts look only at the statute the individual was convicted under, without reviewing record evidence like police reports to assess the immigrant's conduct.[88] Reviewing only the statute, courts evaluate what minimum conduct a defendant would have had to engage in to be convicted.[89] A court can then determine whether that individual necessarily would have had to commit a crime involving moral turpitude, or engage in other disqualifying conduct, to be convicted.[90] As a result, IJs need not take witness testimony or evaluate evidence like court records.[91]

The basis for the categorical approach is derived from statutory language that has been employed since 1891, when Congress first established that immigrants may be removed for criminal convictions.[92] Under the statute, "persons who [had] been *convicted of* a felony or other infamous crime or misdemeanor involving moral turpitude" could be denied admission.[93] Upon review, federal district courts found that the "convicted of" language demonstrated an intent by Congress for IJs to focus their inquiry narrowly on the criminal statute of conviction and the inherent nature of that offense, rather than the facts related to the conviction which could be found in a state court record.[94]

The categorical approach developed through district and circuit courts, and soon gained the U.S. Attorney General's support.[95] In 1933, the U.S. Attorney General embraced the reasoning of the district courts and stated that, in reviewing a conviction, "it is not the duty of the administrative officer to go behind the judgment in order to determine purpose, motive, and knowledge, as indicative of moral character."[96] Further, the Attorney General emphasized the categorical analysis's benefits, including that the

87. Pereida v. Wilkinson, 141 S. Ct. 754, 762 (2021).

88. United States *ex rel.* Zaffarano v. Corsi, 63 F.2d 757, 757–58 (2d Cir. 1933); Shepard v. United States, 544 U.S. 13, 22, 23 (2005).

89. *Shepard*, 544 U.S. at 20–21 (citing Taylor v. United States, 495 U.S. 599, 602 (1990)).

90. *Id.*

91. *Id.* at 21; *see also* Leocal v. Ashcroft, 543 U.S. 1, 7 (2004) ("[L]ook to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime.").

92. Das, *supra* note 86, at 1689.

93. Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084, 1084 (emphasis added). Congress reenacted this statute in 1903, 1907, and 1917, and extended its language to also allow for the deportation of any noncitizen convicted of a crime involving moral turpitude. Das, *supra* note 86, at 1689.

94. United States *ex rel.* Mylius v. Uhl, 203 F. 152, 153 (S.D.N.Y. 1913), *aff'd*, 210 F. 860 (2d Cir. 1914).

95. Das, *supra* note 86, at 1695–96.

96. Immigr. L.—Offenses Involving Moral Turpitude, 37 Op. Att'ys Gen. 293, 294–95 (1933).

tool provides definite standards to immigration authorities to increase uniform treatment under the law, and that it increases administrative efficiency.[97]

2. Congress's Continued Implicit Endorsement of the Categorical Approach

Throughout the development of the categorical approach during the first half of the twentieth century, Congress has maintained the statutory language employed in immigration statutes.[98] Today, the phraseology requiring immigration courts to review only what a noncitizen has been "convicted of" remains,[99] even after the enactment of the INA in 1952,[100] the expansion of the criminal grounds for removal in 1996,[101] and changes to the availability of judicial review thereafter.[102]

Congress declined to adjust the statutory language during the debate surrounding the INA in 1952.[103] The Senate considered an amendment to the bill which would have made a noncitizen's deportability dependent upon the Attorney General's evaluation of a noncitizen's desirability as a resident of the United States.[104] The Senate rejected this amendment, expressing concern that the language would permit IJs to deport individuals based on their subjective view of desirability rather than the conviction at issue.[105] Senator Howard Douglas of Illinois explained that the language would allow the Attorney General to arbitrarily determine a person's qualification for relief based on a subjective determination of that immigrant's desirability.[106] This would leave an immigrant with much less protection on appeal, as a court reviewing the decision would only be able to assess the narrow question of whether the Attorney General reasonably determined that a noncitizen was undesirable and thus deportable.[107]

By rejecting the amendment, the legislature indicated that an IJ's analysis of a noncitizen's state conviction is central in determining a

97. *Id.*; Das, *supra* note 86, at 1696.

98. Das, *supra* note 86, at 1698.

99. *See* 8 U.S.C. § 1229b(b)(1)(C) (permitting the Attorney General to cancel the removal of a noncitizen so long as they were not "convicted of" certain criminal offenses).

100. *See supra* text accompanying notes 62–63.

101. *See supra* text accompanying notes 64–65.

102. Das, *supra* note 86, at 1698.

103. *Id.*

104. *Id.* (discussing S. 2550, 82d Cong. § 241(a)(4) (1952)).

105. *Id.*

106. 98 CONG. REC. 5421 (1952) (statement of Sen. Howard Douglas).

107. *Id.* ("A law suit is no protection if the matter to be reviewed is as vague and variable and arbitrary as the Attorney General's conclusion about a person's undesirability.").

noncitizen's eligibility for relief. Congress maintained the statutory "convicted of" language in the INA, rather than adopting a more discretionary standard, indicating that on review, appellate judges should make their own legal determination of whether a particular statute is disqualifying.

C. The Categorical Approach: A Three-Step Process

Today, the categorical approach is often applied in both the immigration and criminal contexts.[108] In *Carachuri-Rosendo v. Holder*,[109] the Court refined the categorical approach analysis when it held that a noncitizen must have actually been *convicted* of a purported felony for an immigration court to find that the noncitizen was ineligible for cancellation of removal.[110] The petitioner was convicted of two misdemeanor drug offenses in Texas and had received a sentence of twenty days and ten days respectively.[111] During the removal proceedings, the government advocated for a hypothetical approach, arguing that the misdemeanor convictions should have disqualified the noncitizen from relief as they could have been prosecuted as an "aggravated felony" in federal court.[112] The Court rejected the government's position, finding first that the "everyday understanding"[113] of the term "felony" was a serious crime punishable by one year of incarceration, not ten days.[114] Moreover, the Court noted that the term "conviction" is the "relevant statutory hook" when assessing cancellation of removal.[115] As a result, the Court declined to find that the petitioner would have committed an aggravated felony by "focus[ing] on facts known to the immigration court that could have *but did not* serve as the basis for the state conviction and punishment."[116] The Court declined to apply the hypothetical approach advocated by the government, finding that "[t]he mere possibility that the defendant's conduct, coupled with facts outside of the record of conviction,

108. *Compare* Moncrieffe v. Holder, 569 U.S. 184, 194–95, 206 (2013) (finding that, under the categorical approach, the petitioner's misdemeanor marijuana conviction should not be considered an aggravated felony that would disqualify the immigrant from relief), *with* Descamps v. United States, 570 U.S. 254, 264–65 (2013) (applying the categorical approach in the criminal context to determine if the petitioner's burglary offense would qualify for enhancement under the ACCA). For a discussion of *Descamps*, see *infra* notes 127–129 and accompanying text.

109. 560 U.S. 563 (2010).

110. *Id.* at 581–82.

111. *Id.* at 566.

112. *Id.* at 570.

113. *Id.* at 574 (quoting Lopez v. Gonzales, 549 U.S. 47, 53 (2006)).

114. *Id.*

115. *Id.* at 580.

116. *Id.*

could have authorized a felony conviction under federal law [was] insufficient" to find that the noncitizen had been convicted of an aggravated felony.[117]

In *Moncrieffe v. Holder*,[118] the Court further refined the modern categorical approach in considering whether a noncitizen's conviction for possession of marijuana constituted a disqualifying aggravated felony.[119] The Court reiterated that the purpose of the categorical approach is to focus on the statute of conviction and its definition, not the underlying facts of the crime.[120] In doing so, an immigration court may only find that a state offense is a categorical match with a federal offense if that state conviction necessarily involved facts that would lead to a conviction under the federal definition of the crime.[121] Where ambiguity remains regarding what the noncitizen's conviction necessarily involved, the Court explained that an IJ should presume that the conviction rested upon nothing more than the least of the acts criminalized under the state statute.[122] Under the categorical approach, Moncrieffe was not convicted of an aggravated felony as remaining ambiguity meant that his conviction did not necessarily involve facts corresponding to an aggravated felony.[123]

In *Marinelarena v. Barr*,[124] the Ninth Circuit helpfully articulated the modern three-step test the categorical approach follows. First, courts assess whether the conviction is a "categorical match" with a federal law, or a generic offense looking solely at the two statutes.[125] When assessing a conviction, the state statute must include elements that would be satisfied by conduct that is necessarily narrower, or just as broad as the generic offense, to be a categorical match.[126] For example, in *Descamps v. United States*,[127] the Court found that the California criminal statute used to charge the defendants with burglary was broad enough to also potentially be used to charge "a shoplifter who enters a store, like any customer, during normal business hours."[128] Because the Court could not tell, simply by looking at

117. *Id.* at 582 (alteration in original) (quoting 8 U.S.C. § 1229b(a)(3)).
118. 569 U.S. 184 (2013).
119. *Id.* at 189–90.
120. *Id.* at 190–91.
121. *Id.* at 190.
122. *Id.* at 190–91 (citing Johnson v. United States, 559 U.S. 133, 137 (2010)).
123. *Id.* at 194–95.
124. 930 F.3d 1039 (9th Cir. 2019) (en banc).
125. *Id.* at 1044 (quoting United States v. Martinez-Lopez, 864 F.3d 1034, 1038 (9th Cir. 2017) (en banc)).
126. Descamps v. United States, 570 U.S. 254, 257 (2013).
127. 570 U.S. 254.
128. *Id.* at 259.

the statute, whether the defendant had been charged with burglary for robbing a store at gunpoint, or if they merely shoplifted, the Court could not conclude that the defendant had committed a violent felony under the generic definition.[129] Where the state statute is found to be overbroad, meaning that the conduct could be charged as criminal under the state statute, but may not necessarily involve conduct like moral turpitude to be committed, courts move to the next step in the analysis.[130]

If the statute is found to be overbroad, it is then evaluated to determine whether the statute is also "divisible."[131] A statute may be considered divisible if it includes multiple, alternative elements, effectively creating different crimes.[132] Such a statute would require a prosecutor to select a relevant element from the list of alternatives and prove that a defendant committed the crime in the way proscribed under that element to obtain a conviction.[133] For example, in *Shepard v. United States*,[134] the Court evaluated a Massachusetts statute that prohibited breaking and entering into a "building, ship, vessel or vehicle."[135] Some of these provisions qualified as a predicate offense for enhancement under the Armed Career Criminal Act ("ACCA"),[136] while others did not.[137] In this case, the Court found that the statute was divisible, as it effectively defined several different crimes.[138] If a statute is divisible, a judge may be unable to determine what an individual was convicted of simply by looking at the list of potential charges.[139] If a court cannot determine whether an individual was convicted under a provision which involved moral turpitude when reviewing a divisible statute, such as the statute at issue in *Shephard*, courts move to the third step.[140]

If the statute is both overbroad and divisible, only then may courts apply a "modified" categorical approach, where limited records such as the

129. *Id.* at 260, 277.

130. *Marinelarena*, 930 F.3d at 1045.

131. *Id.*

132. *Id.* (citing *Descamps*, 570 U.S. at 264).

133. *See Descamps*, 570 U.S. at 272, 277–78 (holding that, because the California statute was overbroad but not divisible into different forms of burglary, the Court could not move to the modified categorical approach. This concluded the inquiry, as the Court found that the defendant did not necessarily commit a violent felony).

134. 544 U.S. 13 (2005).

135. *Id.* at 31 (O'Connor, J., dissenting) (emphasis omitted).

136. 18 U.S.C. § 924 (allowing for the enhancement of criminal penalties for defendants who commit aggravated felonies).

137. *Shepard*, 544 U.S. at 17 (majority opinion).

138. *See* Nijhawan v. Holder, 557 U.S. 29, 41 (2009) (discussing *Shepard*).

139. *Id.* at 36.

140. Marinelarena v. Barr, 930 F.3d 1039, 1045 (9th Cir. 2019) (en banc).

charging document or a plea colloquy may be considered.[141] Although the modified categorical approach allows courts to evaluate documents regarding the conviction, they may not assess the underlying facts to determine if the defendant's conduct itself fell under a prohibited category.[142] The modified approach acts "not as an exception, but instead as a tool," to determine the statutory provision of a divisible statute the noncitizen was convicted under, and whether the elements of the state statute necessarily match those of the generic offense.[143]

Where Congress intends for the categorical approach not to apply, it achieves this by enacting different statutory language.[144] For example, rather than employing the term "conviction," Congress may describe what specific facts should lead a court to find that a noncitizen's crime was disqualifying.[145] In *Nijhawan v. Holder*,[146] the Court did not apply the categorical approach as the INA indicated that thefts beyond a certain dollar amount constituted a disqualifying "aggravated felony."[147] The Supreme Court has found that the use of such language indicates Congress's intent for immigration courts to assess the underlying conduct and circumstances of a defendant's conviction.[148] Therefore, Congress's use of the term "convicted of" triggers whether the categorical approach or a circumstance-specific approach should apply.

D. Various Circuits' Applications of the Categorical Approach Prior to the Supreme Court's Holding in Pereida

The modified categorical approach assists an IJ in determining which provision of a divisible statute an individual theoretically was convicted under.[149] Considering that provision of conviction, a judge can decide whether an immigrant necessarily would have engaged in prohibited conduct to be convicted.[150]

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141. *Id.*; *see also Shepard*, 544 U.S. at 16 (noting that courts may only review "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge" under the modified categorical approach).

142. Descamps v. United States, 570 U.S. 254, 267 (2013).

143. *Id.* at 263, 267.

144. *Nijhawan*, 557 U.S. at 38.

145. *Cf. id.* (finding that Congress's decision to put a specific dollar amount into the INA for courts to find that a defendant had committed an "aggravated felony" indicated an intent for courts to apply a circumstance-specific approach and evaluate the nature of a conviction).

146. 557 U.S. 29 (2009).

147. *Id.* at 38.

148. Pereida v. Wilkinson, 141 S. Ct. 754, 762 n.2 (2021).

149. Marinelarena v. Barr, 930 F.3d 1039, 1047 (9th Cir. 2019) (en banc).

150. *Id.*

However, in some cases, even limited documents permitted under this rule may be unavailable or unhelpful in determining the statutory provision.[151] A circuit split developed in cases where an immigrant seeking a cancellation of removal order was unable to prove the statutory provision they were convicted under.[152] The First,[153] Second,[154] Third,[155] and Ninth[156] Circuits have found that this ambiguity ends the inquiry as a court will be unable to find that the noncitizen was convicted of a crime involving moral turpitude. Other jurisdictions, including the Fourth,[157] Sixth,[158] Eighth,[159] and Tenth[160] Circuits, read the INA to indicate that noncitizens carry the burden of proving that they were not convicted of a disqualifying offense, and ambiguity regarding their conviction weighs against them.[161] Considering that this circuit split resulted in an uneven administration of immigration laws, the Supreme Court granted certiorari to determine how such ambiguities should be resolved.[162]

151. *Id.* at 1046.

152. *Id.* at 1047 n.6.

153. Sauceda v. Lynch, 819 F.3d 526, 533–34 (1st Cir. 2016) (finding that the categorical approach serves to answer the "purely 'legal question of what a conviction *necessarily* established'" (quoting Mellouli v. Lynch, 575 U.S. 798, 806 (2015)).

154. Martinez v. Mukasey, 551 F.3d 113, 122 (2d Cir. 2008) (finding that "the BIA erred by placing the burden on [the noncitizen] to show that his conduct was the equivalent of a federal misdemeanor").

155. Jeune v. Att'y Gen. of U.S., 476 F.3d 199, 205 (3rd Cir. 2007) (finding that the petitioner's ambiguous conviction did not constitute an aggravated felony, as a court "must rely only on 'what the convicting court must necessarily have found to support the conviction'" (quoting Steele v. Blackman, 236 F.3d 130, 136 (3rd Cir. 2001))).

156. *Marinelarena*, 930 F.3d at 1052–53 (finding that the BIA erred by concluding that ambiguity regarding the petitioner's conviction disqualified them from relief).

157. Salem v. Holder, 647 F.3d 111, 116 (4th Cir. 2011) (holding that a resident-immigrant was ineligible for cancellation of removal because they failed to meet their statutorily-imposed burden of proof for eligibility); *see also* Romero v. Barr, 755 F. App'x 327 (4th Cir. 2019) (per curiam) (declining to revisit the *Salem* holding).

158. Gutierrez v. Sessions, 887 F.3d 770, 776 (6th Cir. 2018).

159. Pereida v. Barr, 916 F.3d 1128, 1132 (8th Cir. 2019).

160. Lucio-Rayos v. Sessions, 875 F.3d 573, 582 (10th Cir. 2017) (declining to follow the precedent of the First Circuit in *Sauceda*).

161. In dicta, the Seventh Circuit expressed approval for the position of the Fourth, Sixth, Eighth, and Tenth Circuits, however, the Seventh Circuit has never directly addressed the question. Sanchez v. Holder, 757 F.3d 712, 720 n.6 (7th Cir. 2014). The Fifth and Eleventh Circuits have not weighed-in on this question. Gomez-Perez v. Lynch, 829 F.3d 323, 326 n.1 (5th Cir. 2016); Francisco v. U.S. Att'y Gen., 884 F.3d 1120, 1134 n.37 (11th Cir. 2018).

162. Pereida v. Wilkinson, 141 S. Ct. 754, 760 (2021).

III. THE COURT'S REASONING

Seeking to resolve the circuit split, the Supreme Court addressed whether a noncitizen should benefit from ambiguity as to which statutory provision they were convicted under, such that a court should conclude that the noncitizen satisfied their burden of proof.[163] Writing for the majority in a 5-3 decision,[164] Justice Gorsuch found that, under the INA, Congress intended for immigrants to carry the burden of proving that their state conviction was not for a crime involving moral turpitude.[165] Thus, ambiguity regarding an individual's conviction meant that the immigrant failed to satisfy their burden of proof and was barred from relief.[166]

The Court cited surrounding provisions of the INA as indication of congressional intent to shift the burden of proof in cancellation proceedings to the noncitizen.[167] The Court noted that the INA requires immigrants applying for relief to provide evidence demonstrating that their case "merits a favorable exercise of discretion."[168] The statute also notes particular forms of evidence that constitute proof of a criminal conviction,[169] and states that in cancellation of removal proceedings, the noncitizen—rather than the government—is assigned the burden of proving "clearly and beyond doubt" that they lack a disqualifying conviction.[170] The majority reasoned that this language demonstrates that Congress "knows how to assign" the burden of proof and intended for the immigrant to carry the burden during cancellation of removal proceedings.[171]

The Court rejected Mr. Pereida's argument that under the categorical approach, the ambiguity related to his conviction should weigh in his favor, explaining that the framework necessarily involves a factual and hypothetical inquiry.[172] The Court explained that the two-part inquiry begins with a "factual" inquiry—determining what the crime of conviction is—and ends with a "hypothetical" inquiry—assessing whether that conviction is necessarily a disqualifying conviction.[173] The factual inquiry is uniquely

163. *Id.*

164. Justice Barrett took no part in the consideration or decision of the case. *Id.* at 754.

165. *Id.* at 767.

166. *Id.*

167. *Id.* at 760–61.

168. *Id.* at 760 (quoting 8 U.S.C. § 1229a(c)(4)(A)).

169. 8 U.S.C. § 1229a(c)(3)(B) (enumerating forms of evidence that constitute proof of conviction, including docket entries and transcripts from a court hearing).

170. *Pereida*, 141 S. Ct. at 761 (quoting 8 U.S.C. § 1229a(c)(2)(A)).

171. *Id.*

172. *Id.* at 762.

173. *Id.*

important when assessing a divisible statute, such as Nebraska's, as the noncitizen seeking relief must provide evidence to show that their crime did not fall under a provision necessarily involving moral turpitude.[174] Further, requiring the immigrant to provide record evidence resolves other factual disputes, such as the identity of the accused.[175] The Court distinguished earlier cases applying the categorical approach such as *Moncrieffe* and *Carachuri-Rosendo*, explaining that the convictions in those cases were known, while Mr. Pereida's conviction was still ambiguous.[176]

The Court concluded its discussion by rejecting policy arguments raised by the petitioner. First, the majority rejected Mr. Pereida's argument that the Court's approach would penalize immigrants who were unable to obtain factual evidence due to poor record-keeping practices of state courts.[177] The Court explained that there was no such issue in this case, as Mr. Pereida should have taken measures to preserve the state record once he had notice of his removal proceedings.[178] Further, the Court declined to assess the merits of the government's policy argument that noncitizens might gain a tactical advantage by withholding evidence of their convictions.[179] The Court found that the Sixth Amendment was not implicated due to the civil, rather than criminal, context of immigration proceedings; therefore, an IJ's findings of fact would not violate the Sixth Amendment.[180] The Court explained that under the INA, Congress expressly permits parties to introduce factual evidence proving the nature of their conviction.[181] By providing this avenue for noncitizens to introduce evidence, the Court found that Congress provided protection to noncitizens, and intended for IJs to assess record evidence related to the conviction without it being considered by a jury.[182]

Writing for the dissenters, Justice Breyer stated that this case was guided primarily by the categorical approach, not burdens of proof.[183] The dissenters noted that Congress's use of the phrase "convicted of" rather than "committed" in statutes like the INA indicated an intent for courts to look only at the statute of conviction, not the underlying conduct.[184] Therefore, the dissenting Justices claimed that if a court cannot determine which

174. *Id.* at 762, 763.
175. *Id.* at 764.
176. *Id.* at 765.
177. *Id.* at 766.
178. *Id.*
179. *Id.*
180. *Id.* at 767.
181. *Id.* (citing 8 U.S.C. § 1229a(c)(3)(B)).
182. *Id.*
183. *Id.* (Breyer, J., dissenting).
184. *Id.* at 768, 769 (emphasis omitted).

statutory provision a noncitizen was convicted under after applying the modified categorical approach, then the IJ cannot find that the conviction necessarily involved prohibited conduct.[185] According to Justice Breyer, to determine the conduct necessarily involved in a noncitizens' conviction, a court should assume that a conviction rested on nothing more than the least of the acts criminalized under the statute.[186] The dissenters noted that the inquiry into a petitioner's conviction is a question of law, not a question of fact, meaning that it is unaffected by burdens of proof.[187] Finally, the dissenters warned that the Court's holding would damage administrative efficiency, make immigration law less predictable, and may hinge a noncitizen's eligibility for relief on the differing practices of state courts.[188]

IV. ANALYSIS

In *Pereida v. Wilkinson*, the Supreme Court held that noncitizens seeking discretionary relief from deportation carry the burden of proving that their conviction did not involve disqualifying conduct.[189] The Court's conclusion is erroneous as it limits and improperly applies the categorical approach intended by Congress.[190] Further, the Court's holding misinterprets its own precedent applying the categorical approach in the immigration context.[191] Lastly, the Court's ruling may damage the efficiency and integrity of the immigration law system.[192]

A. The Court Misread Congressional Intent in the INA

In failing to apply the categorical approach and instead placing the burden on the noncitizen to prove that their conviction was not for disqualifying conduct, the Court misread the INA and the intent of the legislature. Under the canon of statutory construction *generalia specialibus non derogant*, provisions of the same statute should be interpreted harmoniously.[193] However, where they cannot, and unless there is evidence of contrary legislative intent, a specific provision controls over, and creates an exception to, the conflicting general provision.[194] The majority in *Pereida*

185. *Id.* at 770.
186. *Id.* at 770 (citing Johnson v. United States, 559 U.S. 133, 137 (2010)).
187. *Id.* at 772–73.
188. *Id.* at 775–76.
189. *Id.* at 761, 767 (majority opinion).
190. *See infra* Section IV.A.
191. *See infra* Section IV.B.
192. *See infra* Section IV.C.
193. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132–33 (2000).
194. United States v. Porter, 745 F.3d 1035, 1042–43 (10th Cir. 2014).

attempted to harmonize the provision of the INA imposing a burden of proof with the requirement that only a noncitizen's conviction be considered by holding that a noncitizen has the burden of proving that their conviction was not disqualifying.[195]

This Note endorses the position of the dissenting Justices, namely, that the burden of proof language can be harmonized by maintaining the categorical approach exception supported by the Court's precedent and congressional intent. Thus, the statute should be read to find that ambiguity regarding a noncitizen's conviction must be resolved by the existing least-acts presumption, creating an exception to the general provision discussing burdens of proof. Under this standard, courts should assume that a noncitizens' conviction rests on the least of the acts which may be criminalized under the statute.[196] Therefore, an IJ need not determine what a noncitizen was convicted of under the factual inquiry but should instead apply the presumption to determine whether a noncitizen's conviction is disqualifying.[197] Section IV.A.1 describes how the plain meaning of the INA demonstrates an intent for the categorical approach to apply.[198] Section IV.A.2 notes that Congress has declined to amend the language that triggers application of the categorical approach, despite the Court's crafting of a new rule in these cases.[199] Finally, Section IV.A.3 discusses the absurd results that will ensue from the Court's novel reading of the INA.[200]

1. The Plain Meaning of the INA Contravenes the Majority's Interpretation

Through a plain reading of the relevant text of the INA, the Court should have found that Congress intended for the application of a categorical approach—unaffected by burdens of proof—to govern. The plain meaning canon of construction directs courts to regard the plain meaning of the words used by a legislature in a statute as the most persuasive evidence demonstrating legislative intent.[201] Through its reading of the INA, the majority declined to read the statute under the plain meaning intended by Congress for over a century.[202]

195. Pereida v. Wilkinson, 141 S. Ct. 754, 763 (2021).
196. *Id.* at 770 (Breyer, J., dissenting).
197. *Id.*
198. *See infra* Section IV.A.1.
199. *See infra* Section IV.A.2.
200. *See infra* Section IV.A.3.
201. United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543 (1940).
202. *See supra* Section II.B.

Under the INA, a noncitizen will be ineligible for cancellation of removal if they have been "convicted of" a disqualifying offense, including one involving moral turpitude.[203] Congress has employed this statutory language centering on a noncitizen's conviction since 1891.[204] Federal courts in succeeding decades found that this language provides the basis for the categorical approach's application.[205] By using the word "conviction," rather than requiring an inquiry into the acts committed, the plain meaning of the INA as interpreted in the two decades after the statute's enactment indicates that Congress intends for immigration courts to assess the criminal statute a noncitizen was convicted under, not the facts of their particular case.[206] Later courts, including the BIA,[207] the circuit courts,[208] and the Supreme Court,[209] have consistently found that the relevant statutory hook in applying the categorical approach is the language requiring review of an immigrant's "conviction."

Despite this pedigree supporting Congress's intent, the Court's holding in *Pereida* would require immigrants to bring record evidence effectively showing that their conviction was not for disqualifying *conduct* to be eligible for cancellation of removal.[210] To avoid the strictures of the categorical approach, the Court looked to other statutory language of the INA which states that noncitizens have the burden of proof to establish that they satisfy the eligibility requirements for cancellation of removal.[211] The majority found that the plain meaning of the burden of proof language in the INA indicated that Congress intended to place the burden on the noncitizen to prove that their conviction was not disqualifying.[212]

The Court's holding is erroneous.[213] While a noncitizen carries the burden of showing that they qualify for and should be granted the relief they

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203. 8 U.S.C. § 1229b(b)(1)(C).

204. *See supra* notes 92–93 and accompanying text.

205. United States *ex rel.* Mylius v. Uhl, 210 F. 860, 863 (2d Cir. 1914), *aff'g*, 203 F. 152 (S.D.N.Y. 1913).

206. *Id.*; *see also* United States *ex rel.* Zaffarano v. Corsi, 63 F.2d 757, 758 (2d Cir. 1933).

207. *See* Das, *supra* note 86, at 1754–60 (chronicling BIA cases from 1941 to 1989 applying the categorical approach and declining to review the underlying facts of an immigrant's conviction).

208. *See supra* Section II.B.

209. Carachuri-Rosendo v. Holder, 560 U.S. 563, 580 (2010).

210. Pereida v. Wilkinson, 141 S. Ct. 754, 766 (2021).

211. *Id.* at 760 (quoting 8 U.S.C. § 1229a(c)(4)(A)).

212. *Id.* at 764.

213. *Id.* at 775 (Breyer, J., dissenting); Marinelarena v. Barr, 930 F.3d 1039, 1049 (9th Cir. 2019) (en banc) ("The Supreme Court has repeatedly explained that Congress intended to limit the assessment 'to a legal analysis of the statutory offense,' and to disallow [examination] of the facts underlying the crime." (alteration in original) (quoting Mellouli v. Lynch, 575 U.S. 798, 806 (2015))).

seek, Congress did not intend this section of the INA to abrogate the categorical approach's application and necessitate an evidentiary hearing regarding their conviction.[214] This conclusion is clear, given that the categorical approach itself is intended to *prevent* the need for an evidentiary hearing, as immigration courts have been limited to only looking at "convictions" and have thus far been prohibited from factfinding expeditions.[215]

Different provisions of a statute should be read harmoniously with one another, and courts should review statutes to understand where the legislature intended for an exception to apply.[216] The factual questions a noncitizen must prove to qualify for cancellation of removal differ substantively from the requirement that a noncitizen not be convicted of a disqualifying crime such as a crime involving moral turpitude.[217] Proving a negative is more challenging than proving a positive. For instance, a noncitizen can affirmatively prove that they have resided in the United States for more than ten years and can show that a child or spouse would be adversely affected by their deportation.[218] However, proving the more nebulous question of whether a conviction involved moral turpitude would require noncitizens to introduce evidence from outside the record of conviction which may be inaccessible, and which is largely disallowed under *Shepard*.[219]

Courts have consistently found that the question of the nature of an immigrant's conviction is a legal question that is unaffected by statutory burdens of proof.[220] This means that neither party must prove whether a conviction involved moral turpitude, as it is for the IJ to decide in an administrative matter whether the underlying conviction necessarily involved the least of the acts penalized under the statute.[221] Thus, if an immigration court, after applying the modified categorical approach, is unable to find that a noncitizen was convicted under a provision that necessarily involved prohibited conduct, a court cannot conclude that the noncitizen is barred from

214. *Marinelarena*, 930 F.3d at 1048–49 (explaining that the question of burdens of proof has no bearing in cancellation of removal cases, as the analysis into the underlying conviction of a noncitizen is analyzed under the categorical approach).

215. *See supra* notes 96–97 and accompanying text.

216. *See supra* notes 193–195 and accompanying text.

217. *Marinelarena*, 930 F.3d at 1050.

218. *Id.* (finding that the questions of fact involved in removal proceedings are those related to the other three requirements for eligibility under 8 U.S.C. § 1229b(b)(1)). *But see* Gonzalez Galvan v. Garland, 6 F.4th 552, 561 (4th Cir. 2021) (regarding the question of whether a family member would be subject to "exceptional and extremely unusual hardship" as a mixed question of fact and law, rather than a purely factual question) (quoting 8 U.S.C. § 1229b(b)(1)).

219. Shepard v. United States, 544 U.S. 11, 22, 25–26 (2005).

220. *Marinelarena*, 930 F.3d at 1048–49; Mellouli v. Lynch 575 U.S. 798, 806 (2015).

221. *See supra* text accompanying note 122.

relief.[222] The Court's failure to follow the plain meaning of the INA and conclude that ambiguity after the categorical approach's application renders a noncitizen ineligible for cancellation of removal is erroneous and runs counter to Congress's intent.

2. The Legislative History of the INA Indicates Congress's Implicit Endorsement of the Categorical Approach

The Court has improperly altered the categorical approach's application although the relevant statutory language has never been amended by Congress. Under the reenactment canon, where a legislature reenacts a statute with no material changes, it is presumed to have approved of earlier judicial interpretations of that statute, and courts are expected to maintain their consistent interpretation.[223] Despite Congress's decision not to amend the language regarding a noncitizen's conviction that triggers the categorical approach, the Court in *Pereida* has gone against the intent of the legislature in abrogating the rule.

Congress has used the statutory term "conviction" in immigration statutes to indicate an intent for courts to apply a categorical approach for over a century.[224] When the INA was first adopted in 1952, the Senate was given the opportunity to amend this statutory language, however, they declined to do so.[225] Legislative history indicates that Senators were aware of the application of the categorical approach, and intended for a legal analysis of a noncitizen's conviction to continue serving as the dispositive inquiry.[226] In the nearly sixty years since the INA was adopted, Congress has amended the bases for deportability over fifty times.[227] Throughout these amendments, although Congress has added more categories of criminal offenses which may lead to removal,[228] it has not altered the language of the INA to modify the categorical analysis.[229]

In fact, Congress has rejected further attempts to alter the analysis. In 2007, Congress declined to vote on the Border Enforcement, Employment

222. *Marinelarena*, 930 F.3d at 1052–53; Sauceda v. Lynch, 819 F.3d 526, 534, 535 (1st Cir. 2016).

223. Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 536–37 (2015).

224. *See supra* notes 92–97 and accompanying text.

225. *See supra* notes 103–107 and accompanying text.

226. *See supra* notes 105–106 and accompanying text.

227. *See* 8 U.S.C. § 1182 note (2018) (listing amending acts); *id.* § 1229a note (same); Das, *supra* note 86, at 1701.

228. *See supra* note 66 and accompanying text.

229. *See* Section II.B.2; Das, *supra* note 86, at 1701.

Verification, and Illegal Immigration Control Act,[230] which would have redefined aggravated felonies as only those enumerated in the INA, without consideration of the statute the noncitizen was convicted under.[231] The Act would have also expressly placed the burden on the noncitizen to show that "the particular facts underlying the offense do not satisfy the generic definition of that offense."[232] By declining to take action on the bill, Congress implicitly demonstrated that the categorical approach unaffected by burdens of proof should continue to apply.[233]

This conclusion is further supported by surrounding statutory language and the categorical approach's pedigree. When Congress intends for courts to conduct an inquiry into an immigrant's conduct rather than their conviction, the legislature indicates that desire by using different statutory language.[234] The categorical approach framework has been applied in this way for over a century in immigration cases,[235] and Congress has consistently declined to alter it by amending the "convicted of" language in the INA.[236] The Court should have read the absence of amendments to this provision of the statute as indicating congressional acquiescence and acceptance of the categorical approach's application.[237] In finding that the INA intended to place the burden on immigrants to provide evidence on their conviction, the Court misread congressional intent and constrained the long-standing categorical approach.[238]

3. The Court's Interpretation of the INA Will Lead to Absurd Results

The Court's holding will nullify the categorical approach's application in certain immigration cases, which may lead to absurd results for noncitizens seeking relief. Under the absurdity canon of construction, in interpreting legislative enactments, statutes should be read to avoid absurd results the

230. H.R. 4065, 110th Cong. § 201(a)(3)(iii) (2007).

231. *Id.*

232. *Id.*

233. Das, *supra* note 86, at 1701.

234. *See supra* notes 144–148 and accompanying text.

235. *See supra* notes 92–106 and accompanying text (outlining the century-long development of the categorical approach, its reasoning, and the favorable application it has received from the various branches of government).

236. *See supra* text accompanying notes 99–106 (explaining that the INA continues to use the trigger word "conviction," indicating Congress's desire for the categorical approach).

237. Shepard v. United States, 544 U.S. 11, 23 (2005); *see also* Descamps v. United States, 570 U.S. 254, 267–68 (2013) (explaining that statutes like the INA were thoroughly considered by Congress and intended for courts to treat all convictions in the same manner without looking to an individual's underlying conduct).

238. Pereida v. Wilkinson, 141 S. Ct. 754, 776–77 (2021) (Breyer, J., dissenting).

legislature could not have intended.[239] In placing the burden of proof on a noncitizen to prove what their conviction necessarily demonstrates, the Court's holding may lead to absurdities Congress could not have intended because the rule relies heavily on an immigration court's review of state criminal records, which are often ambiguous or poorly maintained.[240]

Courts have consistently found that one of the primary purposes of the categorical approach is to promote uniformity.[241] By finding that ambiguity regarding a noncitizen's conviction results in that immigrant being ineligible for cancellation of removal, the Court's rule will require immigration courts to rely on state criminal court documents which are often unavailable or incomplete.[242]

Requiring IJs to conduct a holistic review of state court documents to determine the factual basis of a noncitizens' conviction will lead to absurd results. State court records of misdemeanor convictions (which crimes involving moral turpitude tend to be)[243] are often not kept "on the record," meaning that no court reporter has memorialized the guilty plea or conviction.[244] The information recorded varies between state courts.[245] Court reporters may not be required to record specific information such as the statutory subsection or factual basis for the plea.[246] For example, in Montgomery County, Maryland, plea forms used at the state district and circuit courts omit the statutory subsection of the conviction.[247] The U.S. Supreme Court is aware of this concern, as it has consistently lamented the fact that state court records are often incomplete and unreliable in expressing its support for the categorical approach.[248]

239. Church of Holy Trinity v. United States, 143 U.S. 457, 460 (1892).

240. Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae Supporting Petitioner at 4–24, Pereida v. Barr, 141 S. Ct. 754 (2021) (No. 19-438), 2020 WL 583960 [hereinafter Amici Curiae Brief for NACDL].

241. Moncrieffe v. Holder, 569 U.S. 184, 201, 205 n.11 (2013); *Descamps*, 570 U.S. at 268 (explaining that, under the ACCA, specific convictions are intended to serve "as an on-off switch," where certain convictions will always result in enhancements, while others will not, without looking at an actor's conduct); *see also supra* notes 96–97 and accompanying text.

242. *Pereida*, 141 S. Ct. at 775–76.

243. Amici Curiae Brief for NACDL, *supra* note 240, at 4.

244. *Id.* at 7–10.

245. *Id.* at 10.

246. *Id.*

247. *Id.*

248. Moncrieffe v. Holder, 569 U.S. 184, 202–03 (2013); Mathis v. United States, 136 S. Ct. 2243, 2253 (2016); *see also* United States v. Davis, 139 S. Ct. 2319, 2344 (2019) (Kavanaugh, J., dissenting) (finding that the categorical approach prevents courts from having to assess decades old documents that may lack factual detail).

These inconsistent and often incomplete recording practices of state and local courts will have absurd results where a noncitizen's ability to obtain relief depends on whether their conviction was adequately preserved. Even where the criminal record is preserved, immigration courts may be uncertain about what the document means, and statements of fact found in these records may be "downright wrong."[249] The categorical approach is necessary as it prevents the re-litigation of past convictions[250] and protects noncitizens from inaccuracies which may haunt them years down the road.[251]

Congress intends to reserve deportation primarily as a penalty for dangerous noncitizens whose crimes may pose a danger to the public. Under 8 U.S.C. § 1229b(b)(1)(C), in addition to noncitizens convicted of a crime involving moral turpitude, Congress denies cancellation of removal relief from those convicted of crimes involving human trafficking,[252] sex offenses,[253] controlled substances,[254] and domestic violence,[255] among other things. Meanwhile, noncitizens who are granted cancellation orders are those convicted only of low-level offenses, and whose deportation would result in "exceptional and extremely unusual hardship" to an immediate family member of the noncitizen, who must be a U.S. citizen, or otherwise lawfully permitted to live in the United States.[256] Under the Court's construction of the INA, however, the Attorney General will not deport noncitizens based on the heinousness of their conviction, but instead on the record keeping practices of state courts. Family members of these individuals, who are often U.S. citizens, will lose their loved ones due to the mere failure of a clerk to adequately maintain the record, running directly contrary to the purpose of the statute.[257] Surely Congress could not have intended such absurd results.

B. The Court Misinterpreted Its Own Precedent Regarding the Categorical Approach

In rendering its holding in *Pereida*, the Court "cast a blind eye over a good many precedents."[258] The Court supported its finding that immigrants carry a burden of proof in cancellation of removal proceedings by asserting

249. Descamps v. United States, 570 U.S. 254, 270 (2013).
250. *Moncrieffe*, 569 U.S. at 200–01.
251. *Mathis*, 136 S. Ct. at 2253.
252. 8 U.S.C. § 1227(a)(2)(F).
253. *Id.* § 1227(a)(2)(A)(v).
254. *Id.* § 1227(a)(2)(B).
255. *Id.* § 1227(a)(2)(E).
256. *Id.* § 1229b(b)(1).
257. *Id.* § 1229b(b)(1)(D).
258. Pereida v. Wilkinson, 141 S. Ct. 754, 764 (2021).

that lingering ambiguity that remains after the application of the modified categorical approach must be resolved by considering the record of conviction.[259] Although the Court agreed that the categorical approach ought to apply, and that only limited documents should be considered, the majority found that when a review of these records proves fruitless and ambiguity remains, the result is that the noncitizen has failed to meet their purported burden of proof in cancellation proceedings.[260]

The Court's reading of the INA is inconsistent with its earlier precedent interpreting the categorical approach. Notably, in cases where ambiguity remains regarding a noncitizen's conviction, the Court has declined to review further court records as evidence.[261] Instead, where an IJ cannot determine what provision of a statute a noncitizen was convicted under by reviewing the record materials, the categorical approach's "demand for certainty" cannot be satisfied.[262] This is because an immigration court assessing a noncitizen's eligibility for relief should center their inquiry on what acts the defendant necessarily would have committed to be convicted.[263] Under the categorical approach, the IJ must presume that the conviction rested on nothing more than the least of the acts criminalized, meaning that any ambiguity should be construed in the noncitizen's favor.[264]

In rendering its holding, the Court distinguished its earlier decisions in *Carachuri-Rosendo* and *Moncrieffe*, asserting that they addressed only whether the minimum conduct for the noncitizen's known offenses triggered adverse immigration consequences.[265] These cases, however, should not be so quickly cast aside. In *Carachuri-Rosendo*, the Court found that an immigrant's misdemeanor drug charges should not result in ACCA aggravation penalties, as immigration courts should not apply a hypothetical approach and construe facts to find *ex post* that a state offense could be enhanced to produce a greater penalty under federal law.[266] The case established as a matter of interpretation that "ambiguities in criminal statutes

259. *Id.* at 761.

260. *Id.* at 761–63.

261. Mathis v. United States, 136 S. Ct. 2243, 2257 (2016).

262. *Id.* (quoting Shepard v. United States, 544 U.S. 13, 21 (2005)).

263. Moncrieffe v. Holder, 569 U.S. 184, 190–91 (2013) (citing Johnson v. United States, 559 U.S. 133, 137 (2010)).

264. *See supra* notes 118–122 and accompanying text.

265. *See supra* notes 108–123, 176 and accompanying text.

266. *See supra* notes 108–117 and accompanying text; *see also* Laura Jean Eichten, *A Felony, I Presume? 21 USC § 841(b)'s Mitigating Provision and the Categorical Approach in Immigration Proceedings*, 79 U. CHI. L. REV. 1093, 1128 (2012).

referenced in immigration laws should be construed in the noncitizen's favor."[267]

Further, in *Moncrieffe*, the Court found that the petitioner's conviction for possessing marijuana was not an aggravated felony, reversing his removal order.[268] The Court applied the categorical approach to review this conviction, and acknowledged that a state offense is only a categorical match if it necessarily involved conduct which would be punishable under the generic federal version of the crime.[269] The Court rejected the government's contention that ambiguity regarding the noncitizen's conviction should be resolved by allowing them to present evidence regarding their convictions.[270] This is because the Court warned that, among other things, such an approach may lead to cases where "two noncitizens, each 'convicted of' the same offense, might obtain different aggravated felony determinations depending on what evidence remains available or how it is perceived by an individual immigration judge. The categorical approach was designed to avoid this 'potential unfairness.'"[271]

In reaching its holding in *Moncrieffe*, the Court did not find that the government had the burden of establishing that the noncitizen was removable.[272] The Court did not discuss burdens of proof in that case.[273] Instead, relying on the categorical approach, ambiguity as to whether Mr. Moncrieffe's conviction was a categorical match simply meant that the conviction did not necessarily involve the minimum conduct needed to be considered an aggravated felony.[274] The Court in *Pereida* declined to review its holding in *Moncrieffe*, asserting that the case is inapposite as it only considered whether the minimum conduct needed to commit the noncitizen's known offense would necessarily lead to immigration consequences.[275] While this may be true, it would certainly be expected that the Court mention that the government has the burden of proving removability by clear and

267. Carachuri-Rosendo v. Holder, 560 U.S. 563, 581 (2010) (citing Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004)).

268. *Moncrieffe*, 569 U.S. at 190, 206.

269. *Id.* at 190–91.

270. *Id.* at 200.

271. *Id.* at 201 (quoting Taylor v. United States, 495 U.S. 575, 601 (1990)).

272. *Cf.* Tanika Vigil, *An Unjust Burden: The Tenth Circuit's Misapplication of the Categorical Approach in* Lucio-Rayos v. Sessions, 96 DENV. L. REV. 369, 386 (2019) (discussing the holding of the Tenth Circuit in *Lucio-Rayos*, which reached the same conclusion as the Court in *Pereida* by also relying on a purported burden of proof determination).

273. *Id.*

274. *Moncrieffe*, 569 U.S. at 194–95.

275. Pereida v. Wilkinson, 141 S. Ct. 754, 765 (2021).

convincing evidence.[276] Instead, the Court made no mention of burdens of proof, indicating that these burdens do not impact the purely legal question of whether a state conviction would categorically be considered a crime involving moral turpitude.[277]

In fact, the Court noted that regardless of whether a noncitizen is bringing an action for cancellation of removal or the Government is seeking to prove removability, the "analysis is the same in both contexts."[278] Other circuit courts have suggested that in footnote four of *Moncrieffe* the Supreme Court intended to show that the categorical analysis applies in both contexts,[279] though applying a different standard would lead to peculiar results.[280] Namely, under this burden of proof approach, a noncitizen would not be removable for committing a crime involving moral turpitude if there is ambiguity in the record. However, if they instead concede that they are deportable and petition for cancellation of removal, they would be ineligible for relief.[281] For instance, say two noncitizens have been convicted of the same crime for the same act, and the same ambiguity exists in each of their state conviction records. Noncitizen A challenges the government's deportation action, and because the government is unable to carry the burden the Court in *Pereida* has placed on them, Noncitizen A is not deported. Meanwhile, Noncitizen B concedes that they are removable, but instead petitions for a cancellation of removal order. Noncitizen B would be unable to carry this burden of proof and thus would not be granted relief. The categorical approach is intended to prevent these inconsistent results that the Court's holding will now create.[282] The Court should have found that the review of a noncitizen's conviction is a legal question unaffected by burdens of proof.[283] In holding otherwise, the Court cast aside crucial precedent which will lead to the inconsistent results the categorical approach is designed to prevent.

C. The Court's Holding Will Harm the Administration of Law and Defies the Spirit of the Sixth Amendment

By placing the burden on a noncitizen to affirmatively prove that their conviction was not disqualifying, the Court's holding will have lasting policy

276. Vigil, *supra* note 272, at 387.
277. Vigil, *supra* note 272, at 387–88.
278. *Moncrieffe*, 569 U.S. at 191 n.4.
279. *E.g.*, Lucio-Rayos v. Sessions, 875 F.3d 573, 583 (10th Cir. 2017).
280. Marinelarena v. Barr, 930 F.3d 1039, 1048 (9th Cir. 2019) (en banc).
281. *Id.* (citing *Moncrieffe*, 569 U.S. at 187).
282. *Id.* at 1048–49.
283. *E.g.*, *id.* at 1049; Sauceda v. Lynch, 819 F.3d 526, 534 (1st Cir. 2016).

implications. The Court's burden-shifting framework will expand the responsibilities of an already overburdened immigration law system.[284] Moreover, this burden will rest heavily on noncitizens who may lack access to representation in an immigration court system that is largely stacked against them.[285]

1. The Court's Holding Will Damage the Judicial and Administrative Efficiency of the Immigration Law System

The Court's holding will strain the administrative system, as it will require IJs in cancellation of removal proceedings to engage in intensive factfinding.[286] Federal courts have long recognized the importance of the "efficient administration" of law in immigration proceedings.[287] However, by placing the burden of proof on the immigrant in cancellation of removal proceedings, immigration courts would be expected to effectively conduct "minitrials" on a noncitizen's conviction.[288] This may require administrative judges to hear testimony and make factual findings on an immigrant's conduct where state court documents are unavailable.[289] This task would be further hampered if a court is unable to locate witnesses such as state prosecutors who have since retired, or if a witness's memory about the crime has faded.[290]

The Court's holding would have immigration courts engage in factfinding that they are ill-equipped to conduct.[291] IJs have substantial dockets[292] and lack reliable access to information regarding the immigrant's conviction to conduct these minitrials.[293] Courts have noted that the

284. *See infra* Section IV.C.1.

285. *See infra* Section IV.C.2.

286. Moncrieffe v. Holder, 569 U.S. 184, 201 (2013).

287. Jean-Louis v. Att'y Gen. of U.S., 582 F.3d 462, 478–79 (3rd Cir. 2009) (quoting United States *ex rel.* Mylius v. Uhl, 203 F. 152, 153 (S.D.N.Y. 1913)); *see, e.g.*, Gertsenshteyn v. U.S. Dep't of Just., 544 F.3d 137, 146 (2d Cir. 2008); Tokatly v. Ashcroft, 371 F.3d 613, 621 (9th Cir. 2004).

288. *Moncrieffe*, 569 U.S. at 201.

289. *Id.*

290. *Id.*; Pereida v. Wilkinson, 141 S. Ct. 754, 775 (2021) (Breyer, J., dissenting); *see also supra* notes 243–257 and accompanying text (discussing the absurd results that will arise if IJs engage in factfinding expeditions during cancellation of removal proceedings).

291. Mellouli v. Lynch, 575 U.S. 798, 806 (citing Jennifer L. Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 295 (2012)); *Pereida*, 141 S. Ct. at 775.

292. *See supra* note 76 and accompanying text.

293. *Moncrieffe*, 569 U.S. at 201 (citing Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3, 5–10 (2008)); *Pereida*, 141 S. Ct. at 775.

immigration system is already overburdened, and their caseload is ever-growing.[294] A report by the EOIR found that the number of pending cases in the immigration system increased from 460,086 at the end of the 2015 fiscal year to 1,399,680 at the end of 2021.[295] During the period from 2015 to 2020, immigration courts saw a 90.2% increase in the number of initially filed cases.[296] However, in 2021, the number of completed cases dropped *significantly*, down from 231,718 in 2020, to 114,751 at the end of 2021.[297] This marks the second year in a row that the total number of EOIR completions has dropped although pending cases have increased at an alarming rate.[298] Expecting these courts to engage in this laborious factfinding risks imposing a severe burden on our nation's already overburdened immigration courts.[299]

Further, one of the great benefits of the categorical approach is that it saves IJs substantial time.[300] The categorical approach prevents IJs from having to review underlying documents concerning a noncitizens' conviction, which may be unavailable.[301] Instead, by making a legal determination of what a noncitizen's conduct necessarily involved, an immigration court can consistently and quickly determine whether a conviction disqualifies an immigrant from relief.[302] By requiring noncitizens to prove that their conviction was not for disqualifying conduct, the Court has limited the immigration justice system's ability to rely on one of its greatest efficiency tools.[303] The Court's holding will necessarily hamper the system's ability to dispose of cases in an efficient and effective manner.

294. *Adjudication Statistics*, EXEC. OFF. FOR IMMIGR. REV. (Oct. 19, 2021), https://www.justice.gov/eoir/page/file/1242166/download.

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. Moncrieffe v. Holder, 569 U.S. 184, 200–01 (2013).

300. Brief for Former United States Immigration Judges and Members of the Board of Immigration Appeals as Amici Curiae Supporting Petitioner at 19, Pereida v. Barr, 141 S. Ct. 754 (2021) (No. 19-438), 2020 WL 598384 [hereinafter Amici Brief for Immigration Judges].

301. *Id.* at 15, 19.

302. *Id.*; *see also* Michel v. INS, 206 F.3d 253, 264 (2d Cir. 2000) ("The BIA's categorical approach to moral turpitude determinations promotes uniformity and relieves the [Immigration and Naturalization Service] of the oppressive administrative burden of scrutinizing the specific conduct giving rise to criminal offenses.").

303. Amici Brief for Immigration Judges, *supra* note 300, at 15, 19.

2. The Court's Holding Will Have Harmful Sixth Amendment Implications for Immigrants Seeking a Cancellation of Removal Order

As the Court in *Pereida* noted, this burden of proof in cancellation proceedings will leave immigrants "with an uphill climb."[304] However, even this remark is an understatement. Circumstances unique to noncitizens already deprive them of access to justice, and the Court's decision will cause this steep burden to seem more like a trek up the side of a mountain. The Sixth Amendment to the United States Constitution guarantees broad protections to criminal litigants, including the right to a trial before an impartial jury, the right to tender evidence and confront witnesses in one's own defense, and the right to be represented by counsel.[305] Despite immigration proceedings being regarded as civil, courts should be mindful that a close nexus exists between immigration decisions and criminal convictions, and vice-versa.[306] There may be substantial "crimmigration"[307] consequences for noncitizens based on the outcome of their cases, including the most "'drastic measure' of deportation."[308] Considering the connection between criminal law and immigration proceedings, courts should extend the spirit of the Sixth Amendment to provide protections during immigration proceedings.[309]

Although the penalties involved in removal proceedings may be substantial, immigrants are not provided legal counsel for these hearings, as they are regarded as civil, not criminal.[310] As a result, immigrants often represent themselves *pro se*, and thus are unaware that they are expected to preserve state conviction records or obtain other documents in their favor,[311]

304. Pereida v. Wilkinson, 141 S. Ct. 754, 760 (2021).

305. U.S. CONST. amend. VI; *see also* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (guaranteeing counsel to indigent criminal defendants under the Sixth Amendment).

306. Padilla v. Kentucky, 559 U.S. 356, 365–66 (2010).

307. The term "crimmigration" highlights the draconian nexus between immigration and criminal law where violations of either create substantial consequences in the parallel legal system. Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006). The term is derived from the immigration policies enacted in the 1990s, which largely obscured the boundaries between crime control and immigration law. Robert Koulish, *COVID-19 and the Creeping Necropolitics of Crimmigration Control*, SOC. SCIS., Dec. 2021, at 1–2.

308. *Padilla*, 559 U.S. at 360 (quoting Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)).

309. *Id.* at 366, 373.

310. Das, *supra* note 86, at 1681 n.46; *see also supra* note 180 and accompanying text; 8 U.S.C. § 1229a(b)(4)(A).

311. Moncrieffe v. Holder, 569 U.S. 184, 201 (2013); *see also* Pereida v. Wilkinson, 141 S. Ct. 754, 776 (2021) (Breyer, J., dissenting) ("And even where complete records do exist, noncitizens, who often are unrepresented, detained, or not fluent English speakers, may not have the resources to offer more than their own testimony." (citing Brief for Immigrant Defense Project et al. as Amici

especially when they are incarcerated pending their hearing.[312] Only thirty-seven percent of all immigrants are represented in removal cases.[313] Immigrants who are detained while they face deportation are only represented fourteen percent of the time.[314] Immigrants represented by counsel are four times more likely to be released from detention, and eleven times more likely to seek relief such as asylum.[315] A detained immigrant represented by counsel is twice as likely to be granted the relief they seek, and a represented immigrant who has never been detained is five times more likely than an individual who was detained to obtain relief.[316] Although noncitizens represented by counsel are more likely to be granted relief, immigrants facing removal often come before immigration courts unrepresented and unprepared to adequately defend themselves. By placing the burden on an immigrant seeking relief, the Court in *Pereida* exacerbates this existing disadvantage and will lead more noncitizens to suffer criminal-like consequences such as deportation without the benefit of counsel.

A factfinding proceeding would also have a negative impact on the adjacent criminal law system. The Court's holding may deprive noncitizens of the benefits of their pleas. Many individuals choose to plead their criminal cases to avoid facts of their conviction from becoming public.[317] Further, many immigrant-defendants plead to offenses in divisible statutes to avoid adverse immigration consequences, such as deportation.[318] In many state criminal courts, prosecutors and defense attorneys employ what has become known as the safe-harbor plea option.[319] Under this practice, in negotiating plea deals for immigrant-criminal defendants, prosecutors and defense attorneys will fashion a criminal penalty that avoids consequences like

Curiae Supporting Petitioners at 11–19, Pereida v. Barr, 141 S. Ct. 754 (2021) (No. 19-438), 2020 WL 598382)).

312. Das, *supra* note 86, at 1685.

313. Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, AM. IMMIGR. COUNCIL (Sept. 28, 2016), https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court.

314. *Id.*

315. *Id.*

316. *Id.*

317. Pereida v. Wilkinson, 141 S. Ct. 754, 771 (2021) (Breyer, J., dissenting).

318. Mellouli v. Lynch, 575 U.S. 798, 806 (2015) (citing Jennifer L. Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 307 (2012)).

319. Brief for Immigrant Defense Project et al. as Amici Curiae Supporting Petitioner at 10–11, Lee v. United States, 137 S. Ct. 1958 (2017) (No. 16-327), 2017 WL 605175 [hereinafter Amici Brief for Immigrant Defense Project].

deportation.[320] For example, this settlement often arises when defense attorneys seek to avoid a theft aggravated felony, which may qualify as an "aggravated felony" if the sentence imposed exceeds one year.[321] Consider a noncitizen who is convicted of petit larceny and receives a twelve-month suspended sentence.[322] Under the INA, a sentence exceeding one year would be considered an aggravated felony and would necessarily result in the deportation of that immigrant.[323] To prevent this, prosecutors and defense attorneys will negotiate a plea deal that does not result in a sentence exceeding one year.[324]

The categorical approach's legal-based inquiry allows for safe-harbor plea deals by making immigration consequences predictable.[325] For example, where a state statute is known to be divisible and ambiguous, a prosecutor may seek a conviction under that statute with the understanding that it will not lead to deportation for the defendant. However, the Court's ruling in *Pereida*, which applies an evidence-intensive inquiry in cancellation of removal proceedings, will limit the predictability that allows for safe-harbor pleas.[326] The novel evidence-based inquiry will lead to differing consequences for an immigrant depending on facts in the record and what an IJ concludes the conviction necessarily involved.[327] By removing predictability, the Court's decision deprives immigrants and prosecutors of that safe-harbor plea option in certain cases, which has consistently been recognized as beneficial to the administration of law.[328]

The Court's holding is also inconsistent with precedent indicating that noncitizens must be adequately advised of the immigration consequences of their guilty pleas under the Sixth Amendment. State courts have indicated their intent for immigrants to be well-advised of potential immigration consequences, and for prosecutors and defense attorneys to avoid substantial

320. *Id.*; Jennifer L. Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 307 (2012); *accord Mellouli*, 575 U.S. at 806.

321. Amici Brief for Immigrant Defense Project, *supra* note 319, at 11 (citing 8 U.S.C. § 1101(a)(43)(G)).

322. *See* Zemene v. Clark, 768 S.E.2d 684, 687 (Va. 2015) (noting that a noncitizen defendant received a twelve-month suspended sentence in exchange for their guilty plea to petit larceny).

323. *Id.* (citing 8 U.S.C. § 1227(a)(2)(A)(iii)); Amici Brief for Immigrant Defense Project, *supra* note 319, at 11 (citing 8 U.S.C. § 1101(a)(43)(G)).

324. Amici Brief for Immigrant Defense Project, *supra* note 319, at 11.

325. Koh, *supra* note 320, at 307.

326. *Id.*

327. *See supra* Section II.B.1.

328. *E.g.*, Mellouli v. Lynch, 575 U.S. 798, 806 (2015); Jimenez-Cedillo v. Sessions, 885 F.3d 292, 300 (4th Cir. 2018).

penalties in certain cases.[329] Early decisions of the U.S. Supreme Court emphasized the need for due process in immigration proceedings.[330] More recently, in *Padilla v. Kentucky*,[331] the Court found that immigrant clients must formally and accurately be advised of the crimmigration consequences of their conviction.[332] The Court recognized the important role of defense counsel in preserving a noncitizen's right to remain in the United States, including by advising a noncitizen on whether to accept a safe-harbor plea deal or proceed to trial.[333] Thus, the consequences of a conviction must be consistent and predictable so that immigration and criminal defense attorneys can provide constitutionally sufficient advice to noncitizens.[334]

A retrial of the facts of an immigrant's conviction before an IJ may also have Sixth Amendment implications. The Sixth Amendment guarantees the right of accused persons to have a trial by impartial jury.[335] Under the Court's approach in *Pereida*, however, the facts underlying a conviction would be assessed by an IJ, rather than a jury.[336] Permitting a judge to hear testimony alone and decide whether the conduct in a noncitizen's conviction disqualifies them from relief is inconsistent with the Sixth Amendment's guarantee of a jury trial.[337] Thus, the evidence-intensive inquiry that the

329. Zemene v. Clark, 768 S.E.2d 684, 692 (Va. 2015) ("[T]he court's consideration of the rationality of a decision whether to accept or reject a plea agreement must include a properly advised defendant's desire to avoid a negative impact on his immigration status.").

330. *See supra* notes 55–58 and accompanying text.

331. 559 U.S. 356 (2010).

332. *Id.* at 372, 373.

333. *Id.* at 368 (quoting INS v. St. Cyr, 533 U.S. 289, 322 (2001)).

334. When the categorical approach is strictly applied, it serves as a powerful tool for defense attorneys to protect their clients from deportation by allowing them to more zealously pursue safe-harbor plea deals and avoid the risk of deportation altogether. Koh, *supra* note 320. Moreover, the categorical approach balances power between federal immigration officials and state criminal justice actors who are closer in time and relation to the offense. *Id.* at 308. At the criminal proceedings stage, state-level actors—such as judges and prosecutors—may discretionarily grant safe-harbor pleas, and as a result, provide some input on a noncitizen's deportability. *Id.*; *see also supra* notes 45–48 and accompanying text (discussing the debate surrounding the Alien Friends Act of 1798 and Thomas Jefferson and James Madison's position that noncitizens should be subjected primarily to the jurisdiction of the state they are in).

335. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .").

336. Descamps v. United States, 570 U.S. 254, 269 (2013). The Court explained that although an immigrant pleaded guilty to the alleged crime and was convicted as a result, the facts of their crime were never submitted to a proper factfinder. *Id.* Additionally, in plea proceedings, courts have found that defendants have little incentive to challenge or correct factual allegations, meaning that some of the findings of a trial court may be "downright wrong." *Id.* at 270; *see also supra* note 17 (noting that in Nebraska, a plea of *nolo contendre* is not an admission of guilt, but simply means that a defendant is not contesting the charge against them).

337. *See Descamps*, 570 U.S. at 269 ("[O]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a

Court's holding necessitates is improvident, as it is contrary to the spirit of the Sixth Amendment.[338]

This incongruence with the Sixth Amendment is even more pronounced when one considers the fundamental flaws and unfairness built into the immigration "justice" system.[339] The current structure of the immigration law system places IJs and the BIA under the jurisdiction and control of the DOJ, a prosecutorial executive agency.[340] During the relief stage, the government has an interest in expeditiously reviewing an immigrant's application for relief,[341] which is further exacerbated by the substantial backlog of cases the EOIR faces.[342] Serving under the purview of the DOJ, commentators have noted that IJs themselves struggle to maintain the impartiality that is crucial to the equitable disposition of immigration cases.[343] Leaders in the immigration community bely the fiscal neglect the immigration system has faced, and the politicization of the immigration system over the past few decades.[344] IJs are evaluated based on the number of immigration cases they review in a given year[345]—under the direction of Attorney General Jeff Sessions "all immigration judges [were required to]

jury, and proved beyond a reasonable doubt." (quoting Apprendi v. New Jersey, 530 U.S. 466, 490 (2000))).

338. Shepard v. United States, 544 U.S. 13, 25–26 (2005) (plurality opinion); *see also* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (reaffirming that courts should read statutes to avoid conflict with the Constitution).

339. *E.g.*, Gregory Chen, *The Urgent Need to Restore Independence to America's Politicized Immigration Courts*, JUST SEC. (Nov. 12, 2020), https://www.justsecurity.org/73337/the-urgent-need-to-restore-independence-to-americas-politicized-immigration-courts/; Tanvi Misra, *DOJ Changed Hiring to Promote Restrictive Immigration Judges*, ROLL CALL (Oct. 29, 2019, 2:51 PM), https://www.rollcall.com/2019/10/29/doj-changed-hiring-to-promote-restrictive-immigration-judges/.

340. *See supra* text accompanying notes 71–73 (explaining the structure of the immigration law system within the DOJ); Chen, *supra* note 339.

341. Christen Chapman, *Relief from Deportation: An Unnecessary Battle*, 44 LOY. L.A. L. REV. 1529, 1561 (2011).

342. *See supra* notes 294–297 and accompanying text.

343. *E.g.*, Chapman, *supra* note 341, at 1566, 1572–73 (finding that IJs may make deportation decisions based on limited information presented by government counsel and instead advocating for a non-adversarial immigration review system); *Panelists Debate How to Fix a Broken Immigration Court System*, AM. BAR ASS'N (June 2018), https://www.americanbar.org/news/abanews/publications/youraba/2018/june-2018/panelists-debate-how-to-fix-a-broken-immigration-court-system/ ("Judge Denise Slavin of Baltimore, representing the National Association of Immigration Judges, said the immigration system deserves a grade of D or D-minus.").

344. *Panelists Debate How to Fix a Broken Immigration Court System*, *supra* note 343.

345. *EOIR Performance Plan: Adjudicative Employees*, EXEC. OFF. FOR IMMIGR. REV. (Apr. 2018), https://cdn.cnn.com/cnn/2018/images/04/02/immigration-judges-memo.pdf (archiving the performance evaluation sheet used by the DOJ under Attorney General Jeff Sessions to evaluate all IJs).

clear at least 700 cases a year to get a 'satisfactory' rating on their performance evaluations."[346] As a result, IJs are encouraged to adjudicate applications for relief as expeditiously as possible, often leading to adverse consequences for noncitizens who are further unable to receive the attention their cases desperately require.[347] Given the backdrop of a neglectful immigration justice system, the Court's holding in *Pereida* is even more unacceptable because it violates the spirit of the Sixth Amendment by harming *pro se* immigrants and deprives noncitizens of plea deals that may help them remain in the United States.

By placing the burden on the noncitizen to show that their conviction was not disqualifying, the Court's holding in *Pereida* will likely damage the administrative efficiency of the immigration justice system, which is ill-equipped to conduct such inquiries.[348] Moreover, the Court's holding is injurious to the spirit of the Sixth Amendment as the lack of predictability in immigration proceedings and the need for greater factfinding will harm immigrants facing crimmigration consequences.

CONCLUSION

In *Pereida v. Wilkinson*, the Supreme Court found that, to be eligible for discretionary relief such as cancellation of removal under the INA, noncitizens bear the burden of proving that they were not convicted of a disqualifying offense.[349] In reaching this conclusion, the Court failed to apply the categorical approach framework intended by Congress based on the plain meaning of the statute.[350] Courts have consistently found that the term "convicted of" triggers the application of the categorical approach[351] and forecloses the need for a burdensome and largely disfavored evidentiary hearing.[352] Regardless, the Court abrogated the categorical approach's application even though the "convicted of" language has consistently been maintained by Congress and language ordinarily indicating that a circumstance-specific approach should apply is not present.[353] The Court's holding will lead to absurd results where an otherwise-qualified noncitizen

346. *Panelists Debate How to Fix a Broken Immigration Court System*, *supra* note 343 (quoting Judge Slavin, who stated that "[n]o other American courts have such a quota . . . . 'The only other court that we found that has [a quota] is in the People's Republic of China'").

347. *Id.*

348. *See supra* Section IV.C.1.

349. Pereida v. Wilkinson, 141 S. Ct. 754, 767 (2021).

350. *See supra* Section IV.A.1.

351. *See supra* notes 203–209 and accompanying text.

352. *See supra* notes 210–222 and accompanying text.

353. *See supra* Section IV.A.2.

will be unable to obtain a cancellation of removal order due to the mere failure of a state court to adequately maintain the record.[354]

Moreover, the Court's holding misinterprets its own precedent[355] on this issue and declines to follow a line of cases that indicate that ambiguities within criminal statutes should be construed in the noncitizen's favor, as the conviction cannot necessarily be found to involve disqualifying conduct.[356] The Court's novel burden-shifting framework has not served as the basis for the Court's reasoning in prior cases[357] and will lead to the inconsistent results the categorical approach is intended to prevent.[358]

Finally, the Court failed to recognize the harmful effect this ruling will have on the efficiency of the immigration justice system.[359] The Court's holding will require IJs to engage in laborious factfinding proceedings to determine the nature of a noncitizen's conviction[360] at a time when the EOIR is struggling to keep up with its swelling docket.[361] The Court's holding will also have harmful Sixth Amendment implications on immigrants seeking relief.[362] By placing the burden on a noncitizen to show that their conviction was not disqualifying, the Court has abrogated the categorical approach's predictability, which ordinarily allows prosecutors to fashion safe-harbor plea deals to protect underrepresented noncitizens from deportation.[363] In the context of an unsatisfactory immigration justice system, the Court's holding will aggravate Sixth Amendment concerns and will subject immigrants to an uphill climb in obtaining relief from deportation.[364]

354. *See supra* Section IV.A.3.
355. *See supra* Section IV.B.
356. *See supra* notes 261–267 and accompanying text.
357. *See supra* notes 272–277 and accompanying text.
358. *See supra* notes 278–283 and accompanying text.
359. *See supra* Section IV.C.1.
360. *See supra* notes 286–290 and accompanying text.
361. *See supra* notes 291–303 and accompanying text.
362. *See supra* Section IV.C.1.
363. *See supra* notes 310–338 and accompanying text.
364. *See supra* notes 339–347 and accompanying text.